No. 14-10154

IN THE

# Supreme Court of the United States

STEVEN L. VOISINE AND WILLIAM E. ARMSTRONG III,
*Petitioners*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF FOR CHILD JUSTICE, INC. AND THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN AS AMICI CURIAE IN SUPPORT OF RESPONDENT


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## BRIEF FOR CHILD JUSTICE, INC. AND THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

## STATEMENT OF INTEREST[1]

Child Justice, Inc. and The American Professional Society on the Abuse of Children respectfully submit this brief as amici curiae in support of Respondent.

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. Timely notice of intent to file this brief was provided to Petitioner and Respondent. Consent to file was obtained from Respondent, and Petitioner filed a blanket consent with the Court.

Child Justice, Inc. is a national organization that advocates for the safety, dignity, and self-hood of abused, neglected, and at-risk children. The mission of Child Justice is to protect and serve children in cases where child sexual abuse, physical abuse, or domestic violence is present. The organization works with local, state, and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children. It provides public policy recommendations, community service referrals, court watching services, research, and education. Child Justice also serves important public interests by securing pro bono representation for protective parents in financial distress and by seeking appropriate judicial solutions to threats facing abused, neglected, and at-risk children.

Child Justice has a strong interest in this Court upholding the firearm ban for individuals convicted of domestic violence misdemeanors, including those convictions under statutes that may include a *mens rea* of recklessness. Child Justice has a deep understanding of what happens when irresponsible adults lose control and become violent around their children. Under the Lautenberg Amendment, recklessly violent behavior that results in a conviction for a misdemeanor crime of domestic violence disqualifies a misdemeanant from possessing a firearm for good reason—young lives are at risk.

The American Professional Society on the Abuse of Children is the leading national organization for professionals who serve children and families affected by child maltreatment, which includes both abuse and neglect. As a multidisciplinary group of professionals, APSAC achieves its mission in a number of ways—most notably through expert training and ed-

ucational activities, policy leadership and collaboration, and consultation that emphasizes theoretically sound, evidence-based principles.

APSAC is a 28-year-old organization that has played a central role in developing professional guidelines that address child maltreatment and, as such, is well qualified to inform the Court about the nature of child maltreatment and the ways in which society acts to prevent it. APSAC is submitting this amicus brief to assist the Court in understanding the perspectives of children and impact of domestic violence upon children in their homes.

## INTRODUCTION AND SUMMARY OF ARGUMENT

"THE CHILD: He hurt Mommy. (Crying).

THE OPERATOR: Okay. Don't cry. We are going to send the police [. . .]

THE OPERATOR: They are in the back room or the bedroom?

THE CHILD: The back—Oh, my God. (Screaming).

THE OPERATOR: What's the matter?

THE CHILD: (Crying) (Unintelligible)."[2]

This amicus curiae brief aims to shed light on the often invisible victims of domestic violence: children. In a majority of households where domestic violence occurs, children are there watching, waiting, and often fearing for their lives.[3] In these households, chil-

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[2] Transcript of the LISA 911 Tape at 3, 5, http://www.ndsec.org/2013connectionshandouts/Trauma/Lisa%20911%20Transcript.pdf (last visited Jan. 15, 2016). The written excerpt displayed here is an incomplete representation of the experience of this six-year-old child who dialed 911 because her stepfather was beating her mother. For a more complete and accurate understanding of this child's experience, the San Francisco Globe made the audio file available to its readers. *See Little Girl Calls 911 as Her Mother Is Being Beaten by Her Stepfather*, The San Francisco Globe (Dec. 8, 2014), http://sfglobe.com/2014/12/06/little-girl-calls-911-as-her-mother-is-being-beaten-by-her-stepfather/. The audio file is embedded at the bottom of the article. This child, like many others, deserves to be heard.

[3] Lawrence A. Greenfield *et al.*, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouse, Boyfriends, and Girlfriends*, U.S. Dep't of Just., Bureau of Just. Stats. 5 (Mar. 1998), http://bjs.gov/content/pub/pdf/vi.pdf (noting that

dren learn that those who are meant to keep them safe are in fact the most dangerous. And one factor increases that danger more than any other—guns.

Guns and domestic violence are a lethal combination. Congress acknowledged this simple truth when it enacted the Lautenberg Amendment, establishing a "zero tolerance" policy that prevented domestic violence misdemeanants from possessing guns. In the words of its sponsor: "[a]buse your wife, lose your gun; beat your child, lose your gun; assault your ex-wife, lose your gun; no ifs, ands, or buts."[4] It is the "ifs, ands, [and] buts" that Petitioners attempt to write into the Amendment by claiming that the statute somehow allows a domestic violence misdemeanant to possess a gun "if" the crime for which they were prosecuted by law enforcement was "accidental conduct."[5] What we—and Congress—know is that the world of domestic violence is unique. In this world, violent "accidents" do not happen. If you lose your temper, if you lose control, if you are reckless to the point that your behavior "draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense[,]"[6] the directive of the statute is clear: you lose your gun.

This is for good reason—too often, young lives are cut short by domestic abusers with guns. Those who survive domestic violence face overwhelming re-

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more than half of female victims of intimate violence live in households with children under the age of 12).

[4] 142 Cong. Rec., S10377-01 (Sept. 12, 1996) (statement of Sen. Lautenberg).

[5] Pet'r's Br. at 10; *see also id.* at 21, 32.

[6] *United States* v. *Castleman*, 134 S. Ct. 1405, 1412 (2014).

percussions, ranging from social and behavioral effects to impaired brain development. Even these repercussions are not the end—children exposed to domestic violence are at increased risk of not only victimization at the hands of an abuser, but also perpetration later in life. Domestic violence turns a child's life upside down, teaching them that everything they learn about love, safety, and family is wrong. The Court should not risk extending such harms in this important case.

## ARGUMENT

### I. SCIENTIFIC RESEARCH CONFIRMS THAT LETHAL AND, FOR SURVIVORS, LASTING CONSEQUENCES OF DOMESTIC VIOLENCE FOR CHILDREN ARE EXACERBATED WHEN ABUSERS HAVE ACCESS TO GUNS.

#### A. Children, The All Too Frequent Victims Of Domestic Violence, Face Lethal And Lasting Consequences.

Some of the biggest victims of domestic violence are the smallest: one national survey found that *one in four* children in the United States is exposed to family violence during their lifetimes.[7] An estimated 15.5 million children living in married or cohabitating U.S. households are exposed to domestic vio-

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[7] Sherry Hamby *et al.*, *Children's Exposure to Intimate Partner Violence and Other Family Violence*, U.S. Dep't of Just., Office of Just. Programs 1 (Oct. 2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232272.pdf.

lence each year, and roughly seven million of them live in homes where that violence is severe.[8]

Even more frightening, in homes where domestic violence occurs, the children themselves are abused or neglected at a rate 15 times the national average.[9] Indeed, the co-occurrence of child abuse and intimate partner violence is well-documented: studies have shown that in "30% to 60% of families in which either child maltreatment or [intimate partner violence] is occurring, the other form of violence is also being perpetrated."[10] Clearly, possession of firearms by those who violently mistreat their intimate partners puts children at risk as well.

And children are often disproportionately affected by domestic abuse: (1) "relative to the general population, families with documented incidents of domestic violence have a significantly higher number of children in the home, especially children younger than age 5[,]" (2) "research suggests that children in violent homes commonly see, hear, and intervene in

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[8] Renee McDonald *et al.*, *Estimating the Number of American Children Living in Partner-Violent Families*, 20 J. of Fam. Psychol. 137, 139 (2006), http://www.ncfm.org/libraryfiles/Children/DV/family-violence-study-may2006.pdf.

[9] *Children Who Witness Domestic Violence*, Children's Defense Fund Ohio 2 (Oct. 2009), http://cdf.childrensdefense.org/site/DocServer/children-who-witness-domestic-violence-ohio.pdf?docID=9961.

[10] Jonathan D. Thackeray *et al.*, *Clinical Report—Intimate Partner Violence: The Role of the Pediatrician*, 125 Pediatrics 1094, 1095 (May 2010), http://pediatrics.aappublications.org/content/pediatrics/125/5/1094.full.pdf.

episodes of marital violence," and (3) "children who witness interparental violence show significantly worse outcomes than those who witness other forms of destructive interparental conflict."[11]

Most tragically, death all too often is the result. An estimated 1,520 children were killed by domestic abusers in 2013.[12] This equates to an average of *four children killed every day* by abuse or neglect.[13] Make no mistake—these are crimes against the most helpless. Ninety percent of children killed during a domestic dispute are under the age of ten; fifty-six percent are under the age of two.[14]

The import of this data is disturbingly clear: allow individuals who have demonstrated a tendency towards domestic violence access to a firearm, and additional harm or death to children almost certainly will result. Consider just five examples of shootings in the time since the First Circuit ruled in this case:

- On November 20, 2015, a Florida man entered his ex-girlfriend's home, shooting and killing her father and her twin five-month-old daughters before

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[11] Katherine M. Kitzmann *et al.*, *Child Witnesses to Domestic Violence: a Meta-Analytic Review*, 71 J. Consulting and Clinical Psychol. 339, 339, 346 (2003).

[12] Child Welfare Information Gateway, *Child Abuse and Neglect Fatalities 2013: Statistics and Interventions*, Children's Bureau 2 (Apr. 2015), https://www.childwelfare.gov/pubPDFs/fatality.pdf [hereinafter "Child Welfare Information Gateway"].

[13] *Id.*

[14] Sibnath Deb, Children in Agony: A Source Book 7 (Sibnath Deb ed. 2006) (citing Fla. Governor's Task Force on Domestic and Sexual Violence, *Florida Mortality Review Project*, at 51, tbl. 28 (1997)).

turning the gun on himself. The woman, who was shot multiple times but survived the attack, admitted there had been a long history of domestic abuse but was too scared to seek a protective order.[15]

- On August 8, 2015, a Harris County, Texas, man shot and killed his ex-girlfriend, her partner, and her six children. The man had previously been convicted of multiple domestic violence offenses involving the victim, and there was an emergency protective order in place against him.[16]

- On June 16, 2015, a man shot and killed his estranged wife in front of the couple's seven-year-old daughter. A divorce complaint filed by the victim alleged that the man had previously beaten her and pointed a gun at her head.[17]

- On May 29, 2015, a man shot and killed his ex-girlfriend and their one-year-old daughter in Chesterfield County, Virginia. The man had previously pleaded guilty to a domestic assault charge, and an order of protection had been issued against

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[15] *Florida mom recounts grisly triple murder-suicide that she survived*, FoxNews.com (Nov. 29, 2015), http://www.foxnews.com/us/2015/11/29/florida-mom-recounts-grisly-triple-murder-suicide-that-survived.html.

[16] *4 things to know about David Conley, accused of killing 8 inside Texas home*, AJC.com (Aug. 9, 2015, 4:42 PM), http://www.ajc.com/news/news/national/3-things-know-about-david-conley-accused-killing-8/nnGQN/.

[17] MaryAnn Spoto, *Neptune cop had threatened wife with gun before, divorce papers say*, NJ.com (June 17, 2015, 4:35 PM), http://www.nj.com/monmouth/index.ssf/2015/06/slain_wife_accused_nj_cop_of_abuse_and_excessive_p.html.

him after he beat the victim just four months earlier.[18]

• On February 10, 2015, an Indiana man shot and killed his three-year-old daughter and six-year-old son after attacking his wife. The husband had been served with a protective order in February, 2013, after previous incidents of domestic violence.[19]

As these stories and statistics demonstrate, an astounding number of children in the United States are exposed to horrific gun violence or directly and violently targeted by members of their own family. If they survive, children face a litany of consequences that science confirms will follow them throughout their lives.[20]

Specifically, child abuse and neglect "impair, often permanently, the activity of major neuroregulatory systems, with profound and lasting neurobehav-

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[18] Laura French, *Stafford Shaw was due in court for a child support hearing*, WTVR.COM (June 1, 2015, 9:41 PM), http://wtvr.com/2015/06/01/stafford-shaw-was-due-in-court-for-a-child-support-hearing/.

[19] *6-Year-Old Dies, Police Still Investigating Paoli Shooting*, WBIW.com (Feb. 13, 2015, 6:42 AM), http://www.wbiw.com/local/archive/2015/02/6-year-old-fighting-police-still-investigating-paoli-shooting.php.

[20] Notably, children indirectly exposed to domestic violence face some of the same behavioral and emotional problems as children who themselves are physically abused. *See Behind Closed Doors: The Impact of Domestic Violence on Children*, UNICEF 3 (2006), http://www.unicef.org/media/files/BehindClosedDoors.pdf [hereinafter "Behind Closed Doors"].

ioral consequences."[21] Maltreated children, including those exposed to domestic violence, are at increased risk for depression, suicide attempts, hallucinations, liver disease, chronic obstructive pulmonary disease, coronary artery disease, autoimmune disease, and obesity.[22]

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[21] Robert F. Anda *et al.*, *The enduring effects of abuse and related adverse experiences in childhood: A convergence of evidence from neurobiology and epidemiology*, 256 Eur. Archives Psychiatry Clinical Neuroscience 174, 174-75 (2006), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3232061/pdf/nihms340170.pdf; *see also* Eamon McCrory *et al.*, *Research Review: The neurobiology and genetics of maltreatment and adversity*, 51 J. Child Psychol. and Psychiatry 1079, 1079 (2010) (finding that early childhood maltreatment is associated with numerous neurobiological deficiencies including "atypical development of the hypothalamic-pituitary-adrenal (HPA) axis stress response, which can predispose to psychiatric vulnerability in adulthood[,]" structural differences in the corpus callosum, and "atypical activation of several brain regions, including decreased activity in the prefrontal cortex").

[22] Vincent J. Felitti & Robert F. Anda, *The Relationship of Adverse Childhood Experiences to Adult Medical Disease, Psychiatric Disorders and Sexual Behavior: Implications for Healthcare*, *in* The Hidden Epidemic: Impact of Early Life Trauma on Health and Disease 79-83 (Ruth A. Lanius, Eric Vermetten, & Clare Pain eds., June 2010), http://www.theannainstitute.org/Lanius.pdf. This data is drawn from the Adverse Childhood Experiences ("ACE") Study, which is collaboration between the Centers for Disease Control and Prevention ("CDC") and Kaiser Permanente's Health Appraisal Clinic in San Diego, CA. This study is the largest ongoing examination of childhood maltreatment and adult health outcomes, routinely examining over 17,000 participants. *Injury Prevention & Control: Division of Violence Prevention*, CDC, http://www.cdc.gov/violenceprevention/acestudy/ (last updated May 13, 2014).

Abused and neglected children are also twice as likely to have poor social skills,[23] have a propensity to struggle academically,[24] and "can literally lose the capacity to form meaningful relationships."[25] Frighteningly, these behavioral challenges include an increased likelihood of violent and aggressive behavior toward others. The Childhood Domestic Violence Association reports that children exposed to domestic violence are seventy-four times more likely to commit violent crimes in the future.[26]

Perhaps the most troubling effect of domestic abuse is this: exposure to parental violence as a child is the strongest predictor of experiencing domestic

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[23] E. Wilson *et al.*, *Child Well-Being Spotlight: Adolescents with a History of Maltreatment Have Unique Service Needs That May Affect Their Transition to Adulthood*, Off. of Plan., Res., and Evaluation, Admin. for Children and Families, U.S. Dep't of Health and Human Servs. 1 (Sept. 18, 2012), http://www.acf.hhs.gov/sites/default/files/opre/youth_spotlight_v7.pdf.

[24] Behind Closed Doors, *supra* note 20, at 3, 7.

[25] Bruce D. Perry, *Supporting Maltreated Children: Countering the Effects of Neglect and Abuse*, 48 Adoption Advocate 1 (June 2012), https://www.adoptioncouncil.org/images/stories/documents/NCFA_ADOPTION_ADVOCATE_NO48.pdf. According to NSCAW data, the majority of adolescents who have experienced child abuse or neglect also are at increased risk for behavioral problems including delinquency, truancy, and substance abuse. *See* E. Wilson et al., *supra* note 23, at 1.

[26] *The Impact*, Childhood Domestic Violence Ass'n, http://cdv.org/the-impact/ (last visited Jan.15, 2016).

violence as an adult.[27] In fact, "adults who were exposed to [intimate partner violence] as children were 6 times more likely to be emotionally abused, 4.8 times more likely to be physically abused, and 2.6 times more likely to be sexually abused than children who were not exposed to [intimate partner violence]."[28]

Social science and medical research has not only identified these far-reaching and long-lasting consequences after years of detailed and extensive study, but scientists have also identified a factor that augments the impact that domestic violence has on a child's life—guns.

### B. Guns Augment The Danger Of Domestic Violence For Children.

"Guns [. . .] turn domestic violence into domestic homicide."[29] In homes where domestic violence already exists, the presence of a gun *magnifies the risk of homicide by 600%*.[30] Between 1980 and 2000, sixty to seventy percent of U.S. domestic abuse incidents that resulted in death of an intimate partner in-

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[27] Miriam K. Ehrensaft, *et al.*, *Intergenerational Transmission of Partner Violence: A 20-Year Prospective Study*, 71 J. of Consulting and Clinical Psychol. 741, 749 (2003), http://www.apa.org/pubs/journals/releases/ccp-714741.pdf.

[28] Jonathan D. Thackeray *et al.*, *supra* note 10, at 1095.

[29] *When Men Murder Women: An Analysis of 2012 Homicide Data*, Violence Policy Ctr. 1 (Sept. 2014), http://www.vpc.org/studies/wmmw2014.pdf.

[30] Jacquelyn C. Campbell *et al.*, *Assessing Risk Factors for Intimate Partner Homicide*, 250 Nat'l Inst. Just. J. 15, 16 (2003), https://www.ncjrs.gov/pdffiles1/jr000250e.pdf.

volved a firearm.[31] As the Court observed in *Castleman*, "the presence of a firearm increases the likelihood that [domestic violence] will escalate to homicide."[32]

Guns in the hands of domestic abusers are not just lethal weapons—they are also tools used to intimidate and control women and children. "[T]here is growing evidence documenting the role of guns in nonfatal domestic violence."[33] According to researchers from the Harvard School of Public Health, when guns are found in the home, they are used in "hostile gun displays" to intimidate and threaten women and

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[31] Emily F. Rothman *et al.*, *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. Am. Med. Women's Ass'n 62, 62 (2005).

[32] *Castleman*, 134 S. Ct. at 1408. While research in this area has focused on intimate partner homicide rather than the homicide of children, the narratives in Section I stand as horrific examples of what happens when children become involved in a domestic dispute involving a gun. What's more—the effect of a child losing a mother in a domestic dispute cannot be disregarded. Children who lose a parent to domestic homicide are often placed in foster homes or left to be raised by older siblings, receiving little, if any, counseling or support. *See Hennepin Cnty. Domestic Fatality Review Pilot Project* 24 (2002) http://archive.leg.state.mn.us/docs/2009/mandated/090863.pdf (finding that "[t]he Review Team found these children's stories very disturbing since none of the documents it obtained contained any information about additional services that were provided to children or their families once they had been place in new custodial care").

[33] April M. Zeoli & Shannon Frattaroli, *Evidence for Optimism: Policies to Limit Batterers' Access to Guns*, in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis 53, 54 (Daniel W. Webster & Jon S. Vernick, eds. 2013), http://home.uchicago.edu/ludwigj/papers/Impact%20of%20Brady%20Act%202013.pdf.

children "more common[ly]" than they are used for self-defense.[34] As one chilling example, an anonymous caller relayed to the National Domestic Violence Hotline that her abuser "threatened [our young] child that he would shoot the entire family, and maybe others."[35] These threats incite terror in the victims, and for good reason: "women who were threatened or assaulted with a gun or other weapon were *20 times more likely* than other women to be murdered."[36]

Attaching a firearm prohibition to the earliest conviction for domestic violence, whether committed recklessly or intentionally, makes sense given that "abuse often starts subtly and gets worse over time."[37] Victims of domestic violence risk a "40% to 80%" probability of repeat violence,[38] and, where previously no injury occurred, there is an 83.7% probability of future injury.[39] Further, a recent study of

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[34] Deborah Azrael & David Hemenway, *In the Safety of Your Own Home: Results from a National Survey on Gun Use at Home*, 50 Soc. Sci. & Med. 285, 290 (2000).

[35] *Firearms & Domestic Violence*, The Nat'l Domestic Violence Hotline, http://www.thehotline.org/resources/firearms-dv/#tab-id-2 (last visited Jan. 15, 2016).

[36] Jacquelyn C. Campbell *et al.*, *supra* note 30, at 16 (emphasis added).

[37] Mayo Clinic Staff, *Domestic violence against women: Recognize patterns, seek help*, Mayo Clinic (Apr. 12, 2014), http://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/domestic-violence/art-20048397?pg=1.

[38] Carla Smith Stover, *Domestic Violence Research: What Have We Learned and Where Do We Go From Here?*, 20 J. Interpersonal Violence 448, 450 (2005).

[39] Alex R. Piquero *et al.*, *Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization,*

408 murder-suicides revealed that prior domestic violence occurred seventy percent of the time, but only twenty-five percent of those cases resulted in prior domestic violence arrests.[40] Notably, eighty-nine percent of murder-suicides involve a firearm.[41] Add a gun to this cycle, and the escalation turns deadly for women and children.

Even when death does not result, the escalation of domestic violence due to the presence of a gun results in worse outcomes for children. One study, for example, found significantly higher risks of behavioral problems among children whose parents use—or threaten to use—guns or knives during a marital dispute, when compared to children who witness domestic violence not involving weapons.[42] Similarly, children who witness domestic disputes that involve a weapon and result in injuries are more likely to experience post-traumatic stress disorder symptoms.[43]

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*Escalation, and De-escalation Evidence from the Spouse Assault Replication Program*, 121 Pub. Health Rep. 409, 414 (2006).

[40] Bernie Auchter, *Men Who Murder Their Families: What the Research Tells Us* 266 Nat'l Inst. Just. J. 10, 10 (2010), https://www.ncjrs.gov/pdffiles1/nij/230412.pdf.

[41] *American Roulette: Murder-Suicide in the United States*, Violence Policy Center 4 (May 2012), http://www.vpc.org/studies/amroul2012.pdf.

[42] Ernest N. Jouriles *et al.*, *Knives, Guns, and Interparent Violence: Relations with Child Behavior Problems*, 12 J. Family Psychol. 178, 190-92 (1998).

[43] John Fantuzzo & Rachel Rusco, *Children's Direct Sensory Exposure to Substantiated Domestic Violence Crimes*, 22 Violence & Victims 158, 167 (2007); *see also* James Garbarino *et al.*, *Mitigating the Effects of Gun Violence on Children and Youth*, 12 Children, Youth, and Gun Violence 73, 74 (2002) http://futureofchildren.org/futureofchildren/publications/docs/12

The development of post-traumatic stress and depression in children who live in a household with a gun is a grave concern given that forty-one percent of teen suicides in 2014 were committed with a firearm.[44]

Further, witnessing domestic violence involving weapons increases a child's likelihood of committing a violent offense with a weapon themselves.[45] "Men who reported witnessing threat or use of a weapon in parental violence were more likely than not to have threatened to use or have actually used a weapon against an intimate partner."[46] When a child witnesses a parent use a gun during a domestic dispute, the child learns that adults use guns to get what they want, and the child observes how to use them. With guns, the danger posed by domestic violence

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_02_05.pdf (finding that "a recent study of rural third-through eighth-graders indicated that children exposed to gun violence reported significantly higher levels of [. . .] posttraumatic stress.").

[44] *Teen Homicide, Suicide, and Firearm Deaths*, Child Trends Data Bank 2 (Dec. 2015), http://www.childtrends.org/?indicators=teen-homicide-suicide-and-firearm-deaths.

[45] John Fantuzzo & Rachel Rusco, *supra* note 43, at 180; *see also* Steve Spaccarelli *et al.*, *Exposure to Serious Family Violence Among Incarcerated Boys: Its Association With Violent Offending and Potential Mediating Variables*, 10 Violence and Victims 163, 174 (1995).

[46] Amy R. Murrell *et al.*, *When Parents Model Violence: The Relationship Between Witnessing Weapon Use as a Child and Later Use as an Adult*, 14 Behav. and Soc. Issues 128, 128 (2005), http://www.firstmonday.org/ojs/index.php/bsi/article/viewFile/359/233.

increases exponentially, the consequences worsen, and the cycle of violence continues.[47]

Congress signed the Lautenberg Amendment to keep firearms away from individuals with a demonstrated history of and propensity for domestic violence[48]—and these laws work. Laws prohibiting abusers subject to restraining orders from purchasing firearms result in a statistically significant reduction in rates of homicide of women by their intimate partners.[49] In fact, restricting access to firearms for individuals subject to a domestic violence restraining order reduced intimate partner homicide by 19% and reduced intimate partner homicides committed with guns by 25%.[50] Further, those who

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[47] Even if a mother is able to leave a domestic abuser, the children are often not safe from the offending parent. *See* Joan S. Meier, *Rates At Which Accused And Adjudicated Batterers Receive Sole or Joint Custody*, Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) 4 (Aug. 2013), http://www.dvleap.org/LinkClick.aspx?fileticket=97ddo5pFEso%3D&tabid=1118 (explaining that one study, which examined 38 state court decisions concerning custody and domestic violence, found that "36 of the 38 courts had awarded joint or sole custody to alleged *and adjudicated* batterers"); *see also* Laurie Duker & Judy Whiton, *Circuit Court Protective Order Practices in Domestic Violence Cases: In the Best Interests of the Child?*, Court Watch Montgomery 9 (May 2014), http://mnadv.org/_mnadvWeb/wp-content/uploads/2014/06/FIN.CC-Rept-5.28.14-rev.pdf (documenting that even after finding by clear and convincing evidence that a parent had committed domestic violence, judges in Montgomery County, Maryland ordered unsupervised visits with the offending parent in 70% of cases).

[48] *See* Section II, *infra* at 20.

[49] Zeoli & Frattaroli, *supra* note 33, at 57.

[50] *Id.*

attempted, but were denied, purchase of a firearm were much less likely than those who purchased a firearm to be arrested for a new crime involving guns or violence.[51]

By preventing individuals with a history of domestic violence from owning a gun, the Lautenberg Amendment reduces the likelihood that pervasive domestic violence will escalate to murder. Reversing the First Circuit would permit scores of convicted abusers to arm themselves,[52] placing their children at greater risk of impaired brain development, academic challenges, social maladaptation, future victimization, future criminal behavior, and death.

## II. THE PLAIN LANGUAGE OF 18 U.S.C. §§ 922(g)(9) AND 921(a)(33)(A) ENCOMPASS MISDEMEANOR DOMESTIC VIOLENCE CONVICTIONS OBTAINED WITH A *MENS REA* OF RECKLESSNESS.

The language of the Lautenberg Amendment recognizes that the physical, mental, and behavioral harms to child witnesses to domestic violence are no different whether the abuser swung a fist, threw a chair, or fired a gun intentionally or recklessly. Sections 922(g)(9) and 921(a)(33)(A) do not limit the

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[51] Garen J. Wintemute *et al.*, *Effectiveness of Denial of Handgun Purchase by Violence Misdemeanants*, Violence Prevention Res. Program, 41-42 (May 29, 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/197063.pdf.

[52] *National Instant Criminal Background Check System (NICS) Operations 2014*, U.S. Dep't of Just. Fed. Bureau of Investigation 18 (2014), https://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report (stating that from November 30, 1998 to December 31, 2014, 112,925 firearm sales were denied because the purchaser had been convicted of a misdemeanor crime of domestic violence).

prohibition on gun ownership to perpetrators convicted of misdemeanor crimes of domestic violence that were committed intentionally.

This Court has recognized that the Lautenberg Amendment was enacted to "close [a] dangerous loophole in the gun control laws," which previously kept firearms only out of the hands of felons.[53] Because perpetrators of domestic violence generally are convicted of misdemeanors under state assault and battery laws, they were left free to access firearms, and "[f]irearms and domestic strife are a potentially deadly combination."[54] The text of §§ 922(g)(9) and 921(a)(33)(A) can only be understood in the "unique context of domestic violence," which, as explained above, differs in kind and consequence from other types of violence.[55]

Under § 922(g)(9), it is a federal crime for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to "possess in or affecting commerce[] any firearm or ammunition."[56] Section 921(a)(33)(A), with exceptions not relevant here, defines a "misdemeanor crime of domestic violence" as an offense that:

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[53] *Castleman*, 134 S. Ct. at 1409 (quoting *United States* v. *Hayes*, 555 U.S. 415, 426 (2009)) (internal quotations omitted).

[54] *Hayes*, 555 U.S. at 427.

[55] *United States* v. *Voisine*, 778 F.3d 176, 180 (1st Cir. 2015), *cert. granted in part*, 136 S. Ct. 386 (2015) (internal citations omitted); *Castleman*, 134 S. Ct. at 1407 (outlining differences between the "use of physical force" as defined in § 921(a)(33)(A) and the force required to commit a "violent felony" under the ACCA).

[56] 18 U.S.C. § 922(g)(9).

> (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force [...] committed by a current or former spouse, parent, or guardian of the victim, or [...] by a person similarly situated to a spouse, parent or guardian of the victim.[57]

The question presented here is whether "reckless" conduct is a "use [. . .] of physical force," a question left open in *Castleman*. Under the categorical approach, the Court must find that a conviction for a misdemeanor crime of domestic violence falls within the scope of 18 U.S.C. §§ 922(g)(9) and 921(a)(33)(A).[58]

There is no *mens rea* requirement in § 922(g)(9). That omission was, no doubt, intentional; Congress chose not to limit § 922(g)(9)'s protections to victims where the perpetrator had been convicted of intentional conduct. As the First Circuit noted in *United States* v. *Booker*, "Congress included a *mens rea* requirement in the immediately preceding section of the legislation that enacted § 922(g)(9),"[59] and had it so intended, could have inserted a *mens rea* requirement in the Lautenberg Amendment. In the absence of an express limitation from Congress, a broader

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[57] 18 U.S.C. § 921(a)(33)(A).

[58] In Maine, a person commits a misdemeanor domestic violence assault when he or she "intentionally, knowingly or recklessly causes bodily injury or offensive physical contact [. . .]" to "a family or household member." Me. Rev. Stat. Ann. tit. 17-A, §§ 207(A)(1), 207-A(1)(A).

[59] 644 F.3d 12, 18 (1st Cir. 2011).

reading of the scope of § 922(g)(9)'s ban on gun ownership is consistent with the goals of the Lautenberg Amendment. It also aligns with the conclusions of extensive research into the dire consequences of introducing guns into the often escalating cycle of domestic violence.

In *Castleman*, this Court held that Congress "incorporated the common-law meaning of 'force'—namely offensive touching" in § 921(a)(33)(A)'s definition of 'misdemeanor crime of domestic violence.'"[60] In other words, "the requirement of 'physical force' is satisfied, for purposes of 922(g)(9), by the degree of force that supports a common-law battery conviction."[61] Petitioners conceded below that "reckless causation of bodily injury is a use of physical force."[62] The degree of force used does not turn on the batterers' level of intent. Whether the perpetrator acted intentionally or with "conscious disregard" for his consequences, the effect on the victim will be the same. The effect on the children witnessing the violence will be the same.

This case provides the Court with the opportunity to clarify that the protections of § 922(g)(9) extend to protect all victims of domestic violence, no "ifs, ands, or buts." Such a holding is consistent with the statutory language and would further the purpose of the Lautenberg Amendment.

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[60] 134 S. Ct. at 1410.

[61] *Id.* at 1413.

[62] *Voisine*, 778 F.3d at 183.

## III. Reversing The Appellate Court's Decision Would Be Contrary To Congressional Intent.

Legislative history reflects that the purpose and scope of the Lautenberg Amendment are "simple"—"Wife beaters, child abusers, and other domestic violence offenders should not have access to a gun. Period."[63] The legislative history reflects an understanding that "all too often, the only difference between a battered woman and a dead woman is the presence of a gun."[64]

As explained by the Lautenberg Amendment's sponsor, § 922(g)(9) was meant to "establish a policy of zero tolerance when it [came] to guns and domestic violence."[65] Absent from the legislative history is any discussion of the perpetrator's state of mind. Senator Lautenberg explained that his amendment would "prohibit *any* person convicted of domestic violence from possessing a firearm."[66] This purpose is reflected in the statutory text, which does not impose a *mens rea* requirement, and instead broadly bars gun ownership for those convicted of a "misdemeanor crime of domestic violence." To think that Congress would have intended reckless domestic violence to be an exception to the broad firearm prohibition for do-

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[63] 142 Cong. Rec. 18,544 (July 23, 1996) (statement of Rep. Woolsey).

[64] 142 Cong. Rec. S10377-01 (statement of Sen. Wellstone); *see also id.* ("Domestic violence, no matter how it is labeled, leads to more domestic violence, and guns in the hands of convicted wife beaters leads to death.") (statement of Sen. Lautenberg).

[65] *Id.* (statement of Sen. Lautenberg).

[66] *Id.* (emphasis added).

mestic violence offenders requires feats of imagination, twisting of words, and a deep misunderstanding of America's problem with domestic violence.

Should this Court reverse the decision below, the result would be entirely inconsistent with the text of § 922(g)(9), opening a loophole akin to the one that Congress designed the Lautenberg Amendment to close. Victims of domestic violence—women and their children alike—who happen to live in states whose statutes define a less than intentional form of domestic violence deserve the same protection from lethal recidivism as those who reside elsewhere.[67] Measured in lives lost, the cost of a contrary ruling would be too high.

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[67] *See* Resp't Br. at 38-42 (identifying states whose misdemeanor battery and domestic violence statutes proscribe reckless conduct). Notably, convictions in a majority of cases are the result of a plea bargain, meaning that the defendant ultimately pleads guilty to a charge that is less serious that the charge he would face at trial. *See Steps in a Trial: Plea Bargaining*, American Bar Ass'n, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining.html (last visited Jan. 25, 2016).

## CONCLUSION

For the foregoing reasons, and those offered by the Government, the decision of the First Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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